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No. 86-315

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES R. RICKETTS, Director of the Arizona Department of Corrections; DONALD WAWRZASEK, Superintendent of the Arizona State Prison; and ROBERT K. CORBIN, Attorney General of Arizona,

Petitioners,

vs.

RANDY GREENAWALT,

Respondent.

RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

Respondent Randy Greenawalt hereby requests permission to proceed in this Court in forma pauperis. Respondent proceeded in forma pauperis in the District Court and Court of Appeals and undersigned counsel was appointed pursuant to the Criminal Justice Act of 1964.

RESPECTFULLY SUBMITTED this 18th day of September, 1986.

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Attorney for Respondent
Randy Greenawalt

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Petitioners,

vs.

RANDY GREENAWALT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUMMARY OF ARGUMENT

In remanding to the district court, the Ninth Circuit took two very limited steps toward final resolution of the issues raised in this capital case. First, the Court of Appeals followed this Court's holding in Shea v. Louisiana, 470 U.S. _____, 105 S.Ct. 1065 (1985), by concluding that the rule announced in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), applies retroactively to a case pending on direct appeal at the time of the Edwards decision. Having made that decision, the Ninth Circuit then ordered a remand to the district court for a "thorough and reasoned application of Edwards to the facts of this case." Greenawalt v. Ricketts, 784 F.2d 1453, 1457 (9th Cir. 1986).

As discussed below, this Court should deny the certiorari petition because the Ninth Circuit's decision narrowly applies a noncontroversial rule of existing law, and because the substantive legal issues posed in the State's petition are not ripe for review.

I. GRANTING THE WRIT IS INAPPROPRIATE BECAUSE THE OPINION BELOW CONSTRUED EXISTING LAW CORRECTLY, CREATED NO "NEW" LAW AND WILL BE OF MINIMAL RELEVANCE TO ANY FUTURE COURT PROCEEDING.

Petitioners characterize the opinion below as "misconceived" and suggest that issuance of a published opinion was "especially pernicious" and created a "potential for far-flung error." (Petition at 25-26.) Such claims are unfounded. One need only consider the narrow scope of the actual holding below,

and the limited guidance it could offer any court in the future, to conclude that this case does not merit certiorari.

Most fundamentally, the Court of Appeals did not create any new legal principle, broaden or narrow the scope of any existing principle or erroneously construe any opinion of this Court. What the Court of Appeals held, and all it held, was that Edwards was temporally applicable to Greenawalt's case. In doing so the Ninth Circuit merely followed, almost ministerially, the directive of this Court as announced in Shea v. Louisiana. The Court of Appeals, performing the essence of its appellate function, simply corrected an erroneous conclusion the district court had reached without the benefit of this Court's intervening Shea decision.

It is difficult to see what future guidance other courts could derive from the opinion below. The Court of Appeals reiterated and applied the holding of Shea and expressly refused to reach any other substantive legal issue. Perhaps some future habeas corpus petitioner could cite the opinion below to demonstrate the retroactivity of Edwards, but that is hardly "pernicious" and, in any event, it is far more likely that he or she would simply cite Shea. As time passes, the retroactivity issue will fade into irrelevance, as will the opinion below.

This case does not implicate any of the considerations governing the grant of certiorari as expressed in Rule 17. The Ninth Circuit's decision does not conflict with a decision of another Court of Appeals or a state court of last resort.

Certainly the Court of Appeals did not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision. Finally, petitioners cannot seriously suggest that in applying Shea the Court of Appeals erroneously decided an "important question of federal law" or that such an issue requires decision by this Court.

II. THE SUBSTANTIVE LEGAL ISSUES ARE NOT RIPE FOR REVIEW AND, AS A RESULT, ISSUANCE OF THE WRIT WOULD BE INEFFICIENT AND WOULD CREATE PRACTICAL PROCEDURAL PROBLEMS.

The Court of Appeals found Edwards to be temporally applicable but expressly refused to address any other issue. Nonetheless, petitioners now present two of these previously unconsidered issues as the basis for seeking review by this Court.

First, petitioners claim that Edwards does not apply to this case because Greenawalt was not "interrogated." Throughout seven years of litigation it was so obvious that Greenawalt had been interrogated that the State never even raised the issue. Everyone just assumed that Greenawalt was interrogated when Detective Brawley awakened him, told him he had come to ask some questions and read him his rights. Petitioners did not argue the issue in the district court. Only after this Court issued its decision in Shea did petitioners feel compelled to present the issue to the Ninth Circuit.

This argument plainly is not yet ripe for review. The district court did not dispose of the issue because it was not

raised. Similarly, the Ninth Circuit's decision does not address the argument. The Court of Appeals merely held that the Edwards rule applied temporally because Greenawalt's case was pending on direct appeal at the time Edwards was decided. The court had no reason to dispose of the interrogation issue since the district court had never ruled on the matter. Instead, the Ninth Circuit remanded to the district court for a "thorough and reasoned application of Edwards." On remand, petitioners will have the opportunity to argue that there was no interrogation, just as Greenawalt will be able to argue that this contention is frivolous and was waived years ago.

Second, petitioners claim that Greenawalt's short consultation with his lawyer through a small hole in his cell door satisfied the requirements of Edwards. Except in dictum, the district court had no reason to focus on this issue because it had concluded, wrongly as shown later by Shea, that Edwards did not apply retroactively. In footnote 2 of its opinion the Court of Appeals stated that it expressed "no opinion regarding the merits of this argument." Petitioners offer no explanation why this Court should now step in and rule on an issue not yet decided by the lower courts.

Petitioners claim that the Court of Appeals misstated the factual record concerning the circumstances surrounding this conversation between Greenawalt and his counsel. Similarly, they contend that certain evidence of these facts was not properly preserved in the record. This confusion in the record, if any,

will not be resolved by issuance of a certiorari petition and merely confirms the need for a remand. As this court noted long ago in United States v. Johnston, 268 U.S. 220, 227, 45 S.Ct. 496 (1925), "We do not grant a certiorari to review evidence and discuss specific facts."

The Court of Appeals remanded for a "thorough and reasoned application of Edwards to the facts of this case." Upon remand the district court will have the opportunity to address all relevant factual and legal issues. The court will be able to settle the factual record, by hearing additional evidence if necessary. With respect to legal issues, the court will have the chance to consider petitioners' interrogation argument and to decide whether Greenawalt's brief consultation with his attorney satisfied Edwards. Thus, each of petitioners' current areas of concern can be considered in the ordinary course and a proper record can be established. In light of the Ninth Circuit's remand order, this case is not ripe for review by this Court. See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327, 88 S.Ct. 437 (1967).

CONCLUSION

The Ninth Circuit limited its holding to the interpretation of Shea v. Louisiana. In framing their reasons why the petition should be granted, petitioners do not challenge that narrow holding. Instead, they rely entirely upon issues that

were not even decided below. Under these circumstances, Greenawalt urges the Court to deny the petition.

RESPECTFULLY SUBMITTED this 18th day of September, 1986.

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G-6.13

CERTIFICATE OF SERVICE

I, CURTIS ULLMAN, duly sworn upon my oath, hereby affirm pursuant to Rule 28 that on September 18th, 1986, I caused the original and nine copies of the foregoing Brief in Opposition to be timely placed in the United States mail, first class postage prepaid, addressed to the Clerk of the Court and three copies to be mailed in the same fashion addressed as follows:

Bruce M. Ferg
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Tucson, Arizona 85701-1367

Curtis Ullman

SUBSCRIBED AND SWORN to before me by Curtis Ullman this 18th day of September, 1986.

Melinda Halsey
Notary Public

My commission expires:

My Commission Expires 10